Supreme Court, U.S.
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No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER,
Petitioner,

v.

LEE BOLLINGER, *et al.*,
Respondents,

and

KIMBERLY JAMES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS KIMBERLY JAMES, ET AL.

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QUESTION PRESENTED

1. Whether the University of Michigan Law School's consideration of race as a factor in admissions is valid under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and 42 U.S.C. § 1981.

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STATEMENT OF THE CASE

When plaintiff filed suit in *Grutter v. Bollinger* in 1997, 41 individually named black, Latino, Native American, Arab American, Asian Pacific American, other minority and white students and three coalitions—United for Equality and Affirmative Action (UEAA), Law Students for Affirmative Action, and the Coalition to Defend Affirmative Action and Integration & Fight for Equality By Any Means Necessary (BAMN), sought and eventually won the right to present our defense of the Law School's affirmative action plan.

Beginning on the 16th of January 2001, a day after the Martin Luther King holiday, the *Grutter v. Bollinger* case went to trial. One month later, after 15 days of trial, and 24 witnesses, the case concluded. The student intervenors fought for the district court trial in order to disprove the plaintiff's claim of "reverse discrimination" and to lift the profound stigma that the attack on affirmative action has placed on the shoulders of minority students. We presented the overwhelming majority of evidence at trial: 15 of the 24 witnesses were called by us, and we used 28 hours and 48 minutes of the 30-hour limit imposed by the district court.

As the student intervenors will show, the plaintiff has not proved that she has been a victim of discrimination—and the United States has not offered a viable alternative to affirmative action. The facts show that if the plaintiff prevails in this Court, the Law School will quickly and inevitably resegregate. That conclusion is confirmed by the resegregation of the universities that has resulted from the end of affirmative action in California, Texas, and Florida. If the plaintiff prevails, gains toward integration will be reversed and replaced by a massive return to segregation starting in the most selective universities and spreading throughout higher education and into the society as a whole.

I. RACE AND THE LAW SCHOOL APPLICATION POOL

For two-thirds of black students and 70 percent of Latino students, the path to the future leads through segregated elementary and secondary schools. The worst segregation, which was once in the South, is now in the major industrial states of the Northeast and Midwest. Michigan is one of four "absolute center[s] of segregation," with 83 percent of its black students attending segregated schools. CAJA 5882, 6053-6054, 7856-7861, 7866-7867, 7881-7882.[1] For Latinos, segregation by race and ethnicity is compounded by segregation by language, with 50 percent of the Latinos in California speaking Spanish at home. CAJA 8393. For Native Americans, over half live in cities where they face segregation like that faced by blacks and Latinos, while just under half remain in impoverished government-run reservations and boarding schools. CAJA 7881-7882, 8674-8676.

The segregation concentrates and compounds the effects of poverty. While poverty disadvantages the poor of all races, poor whites are more dispersed residentially, and their children are far more likely to enroll in schools that have a substantial number of middle-class students. That is far less likely for black, Latino, and Native American students. CAJA 6055, 7867-7870, JA 216.

Even for black students from middle- and upper-middle-class families, substantial disadvantage exists. For equivalent incomes, black families have less wealth, less education, and fewer relatives who can provide financial and other assistance in times of trouble. CAJA 7872-7874. Even when middle class black people or Latinos move to nearby suburbs, the suburbs are, or quickly become, segregated and the school systems quickly decline. CAJA 7872-7877. Even for the very

[1] "CAJA" refers to the Joint Appendix below. "JA" refers to the Joint Appendix here. "PA" refers to the Petition Appendix. "Tr." refers to the trial transcript, Volumes 1-15 (Record 331-345).

few black families who move to stable white, upper-middle-class suburbs with good school systems, there remain racial isolation, stereotyping, tracking, and stigma. CAJA 7874-7876.

In testimony at trial on behalf of the student defendants, Professor Gary Orfield of the Harvard University School of Education summarized the impact of segregation:

> There never was a separate but equal school system. That's because of many things. It's because the poverty levels in segregated schools are much higher. . . . [T]here are fewer minorities in teacher training. There are many fewer teachers who choose to go to work in schools of this sort. Most teachers who start in segregated schools leave faster. The curriculum that is offered is more limited. The probability that the teacher will be trained in their field is much more limited. The level of competition is less. The respect for the institution in the outside world is less. The connections to colleges are less. There are more children with health problems. . . The population is much more unstable. ... The kids don't have books. . . . There [are] no facilities. . . . [I]t is like a different planet, a different society.

CAJA 7862-7863.

Segregation—separate and unequal schools—means that there are far fewer black, Latino, and Native American students who graduate from college. The national pool of students who could apply to a school like Michigan is disproportionately white—and many of the comparatively small number of black, Latino and Native American students in that pool attended segregated elementary and secondary schools.

II. BIAS IN MICHIGAN'S ADMISSIONS SYSTEM WITHOUT AFFIRMATIVE ACTION

A. A segregated school in a segregated profession

Before the advent of affirmative action, there were very few black students who graduated from college, fewer still

who applied to law school, and almost none who were admitted to law school.

In the 1950s and early 1960s, except for the law schools at the historically black colleges and universities, the nation's law schools were essentially all white and all male. In 1960, the nation had 286,000 lawyers, of whom 2180 were black and not more than 25 were Native American. The number of Latinos was not recorded but was unquestionably miniscule. Before 1968, each year there were about 200 black law graduates in the nation.[2]

From 1960 through 1968, the Law School graduated 2687 law students, of whom four were black and none were Latino or Native American. JA 204.

B. The LSAT

In the early 1960s, the University of Michigan Law School admitted students based on a rigid index that combined undergraduate grades with an LSAT score. At that time, the School was not nearly as selective as it would become. CAJA 4857. But as more students went to college—and as affirmative action began to open the doors to minorities and to women of all races—the number of applicants to all law schools expanded dramatically. The schools became more selective and the LSAT became far more important.[3]

The plaintiff and the United States call the LSAT "objective"—but they offer no proof to support the claim that it is an "objective" measure of anything important or that it is "race-neutral" in any way. In fact, all the evidence at trial showed the reverse. *See* discussion *infra*, at 42-45.

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[2] *See* Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions*, 1950-1200, 19 Harv BlackLetter Law Journal 1 (forthcoming Spring 2003), at 3-8, *available at* http://www.law.harvard.edu/studorgs/blj/articles.html.

[3] Kidder, *The Struggle for Access*, at 15-18.

The uncontested evidence presented at trial by the student defendants also demonstrated that test scores had little predictive value. In an uncontested study, Professor Richard Lempert, a member of the committee that drafted the 1992 policy, testifying for the students at trial, established that an applicant's LSAT score did not correlate with later success as a lawyer, measured by income, stated satisfaction, or political and community leadership. CAJA 6201.

C. Undergraduate grades

The other major "objective" criterion in the traditional Law School admissions system is the undergraduate grade point average (UGPA). While the racial gap on that average is much smaller than the LSAT gap, the gap is still significant when admissions are very competitive, as they have been at the Law School for many years. JA 275a-276a.

The racial segregation in K-12 education causes part of the racial gap in UGPAs; but the conditions on the nation's campuses also contribute to the gap. Black, Latino, and Native American students feel and are isolated; and the cumulative effect of a daily run of slights and profiling takes its toll on black and other minority students. *See* discussion *infra*, at 45-46. As the district court conceded, while the effect cannot be quantified for each student, racial prejudice depresses the undergraduate grades and overall academic performance of minority students who apply to Law Schools. JA 276a-277a, 283a-284a.

The grids prepared by the plaintiff's chief witness, Dr. Kinley Larntz, reflect the gap in test scores and grades and stand as a measure of the cumulative effect of discriminatory tests, segregated education, social inequality, and the depressing effect of racial prejudice on the undergraduate grades and overall academic performance of minority students. JA 156-203.

III. THE LAW SCHOOL AFFIRMATIVE ACTION PROGRAM

Under pressure from students on the campus and the civil rights movement, the law faculty began an intense series of debates that stretched from the 1960s through the current date about how to deal with the realities outlined above.

In the course of those debates, faculty members repeatedly recognized that numerical credentials discriminated against black and other minority applicants, "caus[ing] [their] actual potential . . . to be underestimated, especially when gauged by standard testing procedures . . . thought to be 'culturally biased.'" CAJA 4856, 4866-4869, 4872-4873.

In 1973, the Law School graduated 41 black students and its first Latino student. In 1975, it graduated its first two Asian-Americans, followed by its first Native American in 1976. The increasing number of black and other minority students cleared the way for the admission of increasing numbers of women of all races. CAJA 3139, 5065.

After this Court handed down its decision in *Bakke* in June 1978, the faculty formulated a policy to comply with the decision. CAJA 4903-4905.

In 1992, the faculty adopted the plan that is now in effect. The plan calls for consideration of each applicant as an individual; attempts to seek many forms of diversity; and states the School's commitment to enrolling a "critical mass" of black, Latino, and Native American students, who would not be admitted to the Law School in significant numbers without that commitment.

IV. WHAT ENDING AFFIRMATIVE ACTION WOULD MEAN

In ruling for the plaintiff, the district court conceded that the elimination of affirmative action at the Law School would result in an immediate reduction in underrepresented minority enrollment of over 73 percent. JA 223a. But this would only be the start. The end of affirmative action at selective colleges

would dramatically reduce the pool of minority applicants to the Law School, driving the number of minority law students down still further. Within a few years at most, the Law School would again be nearly as segregated as it was in the 1960s. CAJA 7916.

In 1997, the ban on affirmative action announced by the University of California (UC) Board of Regents went into effect. The following year, only one black student enrolled at Boalt Hall. Minority enrollment at the UCLA School of Law dropped dramatically. CAJA 5127.

The few black and other minority students who remain at California's most selective campuses have faced increased racism caused by the elimination of affirmative action. CAJA 8143-8144, 8187-8188.

Dr. Eugene Garcia, the Dean of the Graduate School of Education at Berkeley, testified that black, Latino, and Native American students have been forced from the flagship campuses of the UC system onto its two least selective campuses. As the state's population continues to grow, the "cascade" will continue until the vast majority of black, Latino, and Native American students are forced out of the UC system altogether. CAJA 8406-8411, JA 222.

The UC faculty and administrations opposed the ban and sought to undo its effects. At Berkeley, the school downplayed the importance of grades and test scores; at UCLA, the school attempted to substitute the consideration of socio-economic status for the consideration of race. Because neither approach could serve as a substitute for affirmative action, both schools found it impossible to enroll a class including more than token numbers of black and other minority students. CAJA 7897-7898, 7917.

SUMMARY OF THE ARGUMENT

In this case, the plaintiff is asking the Court to reinterpret the American Constitution to the dramatic detriment of black, Latino, and other minority people and women of all races. If

the Court does what plaintiff asks, it will resegregate, divide, and polarize our country. The authority of the Court would be compromised.

Segregation and inequality are increasing in education. Irrespective of the legal forms used to enforce, to maintain, or passively to justify the separate and unequal condition of education at virtually every level, the fact stands as a profound insult and provocation to the minority youth of America and to the best of the nation's legal and political traditions. Minority children are, in their increasing majority, relegated to second-class, segregated schools—today's version of the back of the bus. The very small handful of black, Mexican American, and Native American students who have made it to the front of America's education bus—institutions like the University of Michigan Law School—are now being told by the plaintiff to get out of their seat and move to the back of the bus.

The demographic fabric of America is changing. By the middle of this century, no racial grouping will be in the majority. America will be a more diverse society; it must not become a more segregated society. We must strive to make equality more, not less, of a reality, or we will surely face renewed social convulsions.

The movement to defend affirmative action and integration has awakened and stirred into action every sector of this society. What unites these many peoples in defense of affirmative action is the conviction that the Constitution's pledge of equality should have meaning and currency in our collective American future. Our progress as a nation depends on the realization of this prospect.

ARGUMENT

I. THE FUNDAMENTAL QUESTION BEFORE THE COURT IS HOW TO UNITE THE NATION UNDER THE CONSTITUTION

A. Our Constitution cannot unite our nation if it is converted into a document that sanctions racial discrimination in the name of a false standard of equality

The case before the Court goes to the heart of the Constitution and the central defining issues of American history. It raises the central question faced by the original framers of the Constitution: how to create a united nation out of many peoples.

It is this question—how to unite the nation—over which the student intervenors disagree fundamentally with plaintiff Barbara Grutter and her attorneys, working with the Center for Individual Rights (CIR). The original framers' most important debates centered on this question. The Constitution they devised was essentially a set of agreed-on principles, formulated through a series of critical compromises, aimed at uniting into a single stable national society a people organized in 13 states, each proud, protective, and jealous of its own prerogatives, and divided between two already increasingly polarized economic systems, one free and the other slave. The centrality of this question is suggested in the fact that, even before the constitution was ratified, three of the greatest founders, John Adams, Benjamin Franklin, and Thomas Jefferson, proposed that the Great Seal of the United States bear the Latin motto *E Pluribus Unum* – out of many, one.[4] On the Seal a fierce eagle clutches this motto in its beak, as if the American bird has just snatched this precious unity from the perils of history.

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[4] Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall – A Comment on Lynch v. Donnelly*, 1984 Duke L.J. 770, 773.

Yet, in the midst of their work of national unification, the framers sanctioned and seemed prepared to perpetuate, along with the division between slave and free, a division between black and white that would come to dominate the first epoch of the new republic's politics and threaten over and over to tear it apart.

In 1978, in his impassioned and sometimes bitter opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)—the case whose much-contested principles now come once more before this Court for definitive interpretation—Justice Thurgood Marshall sums up the ironies in this moment of creation of the American republic in unequivocal and provocative terms.

> In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color.

Bakke, 438 U.S. at 389.

Justice Marshall goes back even further, to the fundamental principles enunciated at the moment of the nation's birth in its founding document in 1776.

> The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men.

Bakke, 438 U.S. at 388.

It is entirely in the spirit of the fundamental difference between the student intervenors and the plaintiff that the

essential inequalities Justice Marshall identified in these two documents at the foundation of the American legal and political tradition are, in a certain sense, invisible in the texts themselves. Jefferson's Declaration proclaims "all men are created equal" as a universal principle. The Constitution makes no explicit reference to race, and the framers appear to have fastidiously avoided the word slavery in the document, as if they were ashamed of what they were doing as they did it, in particular in those passages plainly aimed at entrenching the right to slave property in the new republic's legal system. In the parlance of the plaintiff, both documents were perfectly "colorblind."

In extensive testimony at trial on behalf of the student intervenors and in an expert report submitted on behalf of the University, distinguished historian Eric Foner offered, on the basis of a lifetime of scholarship studying these issues, support and explanation for Justice Marshall's provocative perceptions.

> The mental picture that existed of this country from the very beginning among the people who were creating it was of a society of . . . white people, a racial definition of nationhood. . . .
>
> . . . in a country that prides itself on its devotion to liberty as we do in the Declaration of Independence, in a country founded on the principle that all people are created equal, what justification exists for slavery? The only justification is a justification of racial inferiority. So in a contradictory way, the very emphasis on freedom and equality which the Revolution generates also generates a very severe form of racism to justify the exclusion of blacks from these rights which are proclaimed to be the rights of all mankind. So that you have the growth of democracy and egalitarianism and the intensification of racism going hand-in-hand from the Revolution all the way up to the Civil War to defend

> slavery but also to defend the boundary which excludes blacks from the rights enjoyed by white Americans.

CAJA 8422.

The beautiful and abstract universal principles of Jefferson and Madison, the hallowed principles of freedom and equality, were, in our origins, inseparable from and indeed employed as a very basis for the justification of slavery, racism, and inequality. Justice Marshall sums this up as a conflict between "abstract equality" and "genuine equality."

It is the contention of the students that the plaintiff in this case seeks to return American Constitutional law, not, of course, to the days of slavery, but to a time nevertheless when a bloodless and lifeless principle of "abstract equality" could be used to cover and sanction the reality of the denial of "genuine equality" to millions of our fellow citizens. For these founding documents, in all their abstractness so deeply implicated in the sanction of slavery and racism provide, from the standpoint of the plaintiff, perfect examples of the sort of "colorblindness" the plaintiff would like to impose on this Court and reimpose on American history.

What both Justice Marshall and Professor Foner understand is that what has given life to the great American principles is not the dogmatism of those like the plaintiff in this case, for whom no equality is permissible except as an abstraction. From "all men are created equal" to "equal protection of the laws" is not the story of how one logical abstraction led to another. It is a development that came out of a history of suffering and struggle to create equality and justice where inequality and injustice prevailed before, a living struggle that has redefined the great words of the nation's history in the process of trying to making them living realities.

In Professor Foner's words,

> The origins of the idea of an American people unbounded by race lies not with the founders, who by and large made their peace with slavery, but with the abolitionists. The anti-slavery crusade insisted on the "Americanness" of slaves and free blacks, and maintained that birthplace, not race, should determine who was an American . . . [the idea] later enshrined in the Fourteenth Amendment. . .

CAJA 2647.

The unity based on abstract conceptions of freedom and equality came apart on the battlefields of the U.S. Civil War, as brother fought brother in America's bloodiest conflict, proving in life-or-death struggle the truth of Lincoln's assertion that "a house divided against itself cannot stand," that America could not be united as both slave and free.[5]

The victory of the Union and freedom in the Civil War fundamentally redefined the unity of the nation. The nation could no longer be united on the basis of a compromise with slavery, wrapped up in an abstract assertion of freedom, nor on the basis of an abstract equality whose reality rested on black slavery and all the inequalities that flowed from it. In a shining moment at Gettysburg Lincoln declared the new reality in deathless words. In the Thirteenth, Fourteenth, and Fifteenth Amendments, legislators sought to give Constitutional expression to the historic change wrought, in reality, by those who, on and off the battlefield, had given "the last full measure of devotion" to the cause of Union, freedom, and equality.[6]

As the abolitionists' vision of the nation began to become a reality, Jefferson's abstract principle of equality, redefined by war and emancipation, placed by Lincoln at the roots of the national purpose, became a hammer to strike the chains from the limbs of black men, women, and children. As this change

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[5] Lincoln, *"House Divided" Speech at Springfield, Illinois*, in Lincoln, Speeches and Writings, 1832-1858, 426 (Fehrenbacher, ed. 1989).

[6] Lincoln, *Address at Gettysburg, Pennsylvania*, in Lincoln, Speeches and Writings, 1859-1865, 536 (Fehrenbacher, ed. 1989).

in the nation's real conditions of day-to-day life found legal expression in the Fourteenth Amendment and a series of civil rights and Reconstruction measures, the rights of citizenship proclaimed in the Constitution and Bill of Rights became, in principle, real protections for the privileged and oppressed alike, to be enforced in all the states, as need arose, by the federal courts.

This historical moment, however, was tragically short-lived. Justice Marshall sums up this next chapter in the history of American "colorblindness" in his opinion in *Bakke*.

> Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War. . . .
>
> ...Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward: "By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part ot the authority presumably given the government for protection of civil rights."

Bakke, 438 U.S. at 390-391.

There follows Justice Marshall's review of this legal history, in which "the Court strangled Congress' efforts to use its power to promote racial equality" and characterized civil rights protections as a matter of treating black citizens as the "special favorite" of the laws—as if echoing the plaintiff's brief in this case on the question of so-called "preferences": "The Court's ultimate blow to the Civil War Amendments and the equality of Negroes came in *Plessy*. . . . [i]gnoring totally the realities of the positions of the two races. . . ." *Bakke*, 438 U.S. at 392.

In *Plessy* the Court achieved a high point in embracing the sort of abstract "equality" that the plaintiff would like to

impose in the present case. Over Justice Harlan's famous dissent, the *Plessy* Court used the words of equality to ensure a reality of increasing inequality in declaring "separate but equal" to be Constitutional. *Plessy v. Ferguson,* 163 U.S. 537 (1896).

With *Plessy*, the nation had tragically returned to the policy of attempting to unite itself on the basis of an abstract theory of equality ("separate but equal"), the reality of which was the deepening division of the nation along the lines of racial segregation. The principle of "equality" that segregated black citizens inevitably came to justify applying the principle of "separate but equal" to measures aimed at dividing all non-white from white Americans. Nor was the purpose of this abstract "equality" difficult to discern. Its aim was to reentrench the old white privilege—and not only in the South—over against the newly enfranchised black citizens, who, in their separateness, would remain perpetually unequal. As Mexican Americans and Chinese and other Asian Americans emerged as growing factors in various regions and sectors of the nation's economy, similar attitudes found expression in similar practices of ghettoization, segregation, and second-class citizenship imposed on these nonwhite Americans as well.

The Jim Crow period was characterized by a constant process of improvisation, not least in the law and in court decisions. At trial, Professor John Hope Franklin, dean of the field of American black history, emphasized that in his own life he had been forced to appreciate "the inconsistency and the remarkable ingenuity . . . of racial discrimination [on the part] of those who practiced it. . . And I came to the conclusion that the maintenance of [white supremacy] was so important that they didn't mind being inconsistent. They didn't mind being improvisational. . . ." CAJA 7933-7934, 7942.

It was against this historical background, after the labor and social upheavals of the 1930s, the New Deal, and the

"judicial revolution" of 1937, that this Court finally, in 1954, declared, in *Brown v. Board of Education*, 347 U.S. 483 (1954), that "in the field of public education the doctrine of 'separate but equal' has no place," and that the plaintiffs in *Brown* were "by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Brown*, 347 U.S. at 495. Building on a handful of earlier decisions, with the decisive stroke of *Brown*, this Court seemed to restore the Fourteenth Amendment to its original meaning. The *Brown* Court repudiated the project, implicit in the logic of *Plessy*, of uniting the nation on the basis of the legal falsehood of an "abstract equality," the reality of which was the institutionalized racism and inequality of segregation. The nation was to be united, not on the basis of segregation rationalized and sustained by "abstract equality," but on the basis of the integration of its diverse races and peoples through a reaching out in the direction of, in Justice Marshall's words, "genuine equality."

Formally, the 1954 finding in *Brown* was not at issue in *Bakke*, as Justice Marshall understood perfectly well. The Court in 1978, though split sharply over the issues in *Bakke*, stood in its entirety on *Brown*. Yet Justice Marshall felt he had to look beyond the formality of the legal issues before the Court in *Bakke* to the implications for American society in the decision the Court was making. At the beginning of his opinion he makes the sweeping reference to "200 years" of the Court's failure to understand the Constitution as prohibiting "the most ingenious and pervasive forms of discrimination." *Bakke*, 438 U.S. at 387.

In the body of his opinion he reviews the betrayals and broken promises of the post-Reconstruction period. When he comments on the opposition to affirmative action within the Court in the matter at hand, he seems to hear about his brother Justices' ears the shouts of the white mobs in Boston threatening black children boarding buses to integrate

Boston's public schools. He concludes with bitterly prophetic words.

> I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the Civil Rights Cases and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.

Bakke, 438 U.S. at 402.

In the years since 1978, Justice Powell's decision in *Bakke* has proven to be, if not the strong basis on which to sustain the movement toward an America united through integration Justice Marshall argued for, also surely not a decision that has "destroyed the movement toward complete equality." *Bakke*, 438 U.S. at 402. Rather, the Court's decision has proven to be one of those conservative compromises that others have claimed Americans have a genius for. From the standpoint of the student intervenors and those they have spoken for in this case, Justice Powell's decision is an inadequate one, a decision that helped slow down progress towards "genuine equality," even helped set it back to a certain extent, but did not halt it. To most Americans, uniting the nation on the basis of Justice Powell's conception of diversity merged easily with the aspirations inspired by *Brown* to unite the nation on the basis of integration. The methods of unification might have been constrained, but the progress toward an integrated nation could continue, slowed down, on the indirect paths Justice Powell had sanctioned even if not on the direct road to freedom. Even with all its limitations, the student intervenors must insist that Justice Powell's decision has met the test of history. It deserves to be sustained.

It is for this very reason that the plaintiff must seek the reversal of the *Bakke* decision itself, in the name of one of those dogmatic, abstract conceptions of equality that throughout American history has been used to sanction and sustain "the most ingenious and pervasive forms" of inequality between our peoples. The students regard the plaintiff's case as merely the latest example of the "improvisational" and "ingenious" character of racism John Hope Franklin spoke of at trial, wrapped up yet again in one of those concepts of what Justice Marshall refers to as "abstract equality" substituted for the "genuine equality" the *Brown* decision represents in American Constitutional history, as in the aspirations of the great majority of all Americans of all races.

B. The plaintiff's case rests on the false premise that the LSAT is a "colorblind" and non-discriminatory standard of equality

In fact, the real-world basis of the plaintiff's case is one of the most "ingenious and pervasive" of those abstract standards of "equality" in recent American history: the standardized test that determines who shall and who shall not have access to higher education, in this case access to one of the nation's finest law schools. For the whole of the plaintiff's argument rests on the demonstrably false premise that the LSAT, combined with undergraduate grades, is a fair and "equal" standard for admission to the University of Michigan Law School. Without this premise, Barbara Grutter and the Center for Individual Rights have no case.

At trial, the student intervenors demonstrated, with a series of expert witnesses, the discriminatory character of the LSAT. The evidence presented to prove the bias of this test against black, Latino, and Native American students was largely uncontested. The biases of the LSAT have long been known. The University of Michigan Law School has been well aware of them. The University never defended the

LSAT against the specific allegations of bias offered by the intervenors. Nor, obviously, did the student intervenors seek to condemn the University for this historically well established discriminatory character of the LSAT and therefore of its primary admissions criteria—and for a simple reason. The Law School has sought, throughout the recent period, to offset these biases by means of its modest affirmative action policies. The results are not spectacular, but they are positive and important. The discrimination otherwise inescapable in its admissions system is to some extent compensated for by the consideration of race among students already qualified for admission to a school with far more qualified applicants than it is able to accept.

The student intervenors contend that the Law School has the Constitutional right—as well as the civic duty—to implement voluntary measures to offset the discriminatory impact of its own admissions criteria.

However much the plaintiff has sought to evade the question, her case must rise or fall on the truth of the assertion that the LSAT is a test that does not discriminate. That assertion is palpably false. All the tricks of plaintiff's statistician, Kinley Larntz, all those impressive-looking grids, and all the statistician's jargon boil down to a single falsehood, for all are based on a formula that itself discriminates against black, Latino, and Native American students. The Law School, to its credit, uses its affirmative-action policies, modest in the extreme as they are, to undo some portion of the odious impact that its two main admissions criteria would otherwise have on the fairness of its admissions process as well as the diversity of its student body.

Over against this modest engagement with reality, the plaintiff demands that real measures of equality must cease so that its abstract and false standard of equality, the LSAT, may take their place. Barbara Grutter demands that real discrimination against minority applicants be reestablished and given

the sanction of the Constitution so that a false equality may be enshrined in the law to protect white privilege.

The United States' brief in this case is more moderate in form than the plaintiff's: the United States does not demand the reversal of the *Bakke* ruling. But the United States' demand is the same in substance and more dishonest intellectually.

In suggesting, in effect, that this Court might uphold *Bakke* but overturn the Law School's affirmative action policies, the United States invites this Court to reduce the political flack an anti-affirmative action decision might arouse. The United States is dishonest in failing to acknowledge the importance of the considerable difference in method and conception between the University's affirmative action measures at its Law School and the measures at issue in *Gratz v. Bollinger* (No. 02-516). The student intervenors, of course, regard the affirmative action policies at issue in *Gratz* as clearly constitutional. But as both the University and the intervenors make clear, the measures of affirmative action employed by the Law School are exceptionally minimal, their tailoring to Justice Powell's ruling extremely deliberate and strict. To uphold Justice Powell's decision while overturning the Law School's policies is to render the *Bakke* decision a dead letter while pretending to keep it alive. It is a cynical politician's decision on how to make it through the next election, not a decision worthy of the nation's highest judicial body.

The immediate practical question facing the Court is whether to sustain a compromise—as stated above, a conservative compromise—and, if it is to be sustained, how to interpret it. It should be obvious how much the genuine sustaining of Justice Powell's painfully reasoned decision would mean to Kimberly James and the other student intervenors: it would mean at least a partial recognition by the nation's highest legal tribunal that their worth as people and citizens and their right to serve their nation as lawyers and leaders cannot be defined by the discriminatory standard

embodied in the LSAT—that the University of Michigan Law School has been right to attempt, to some degree, to treat them as whole and unique individuals.

C. This Court should not turn reality upside down

Both the United States and the plaintiff address this Court in the name of a "colorblind" standard for university and college admissions. The University and the student intervenors, too, yearn for a truly colorblind society. It would be a fine thing indeed if, in reality, this meant that all parties to this contentious legal dispute agreed on this basic principle.

But the sort of "equality" urged by the plaintiff on the Court is to be found only in the grave. For the truth is that "colorblind," like many of the most important words in our nation's history, has meant different things in different contexts and in the mouths of different people. When Justice Thurgood Marshall quotes Justice Harlan's dissent in *Plessy* and reminds his colleagues that "the majority of the Court rejected the principle of colorblindness . . . for the next 58 years," *Bakke*, 438 U.S. at 401, he is obviously expressing his lifelong opposition to the discrimination inherent in the "colorblind" principle of "separate but equal." When the plaintiff speaks of "colorblindness" and means the false equality of the LSAT, with its now well established history of excluding minority students from legal education, the term "colorblind" has merely become a code word for segregation and resegregation.

Our nation has evolved over the course of its long journey through history since 1776—most Americans would surely say, overall, for the better. Jim Crow was not the same as slavery. Something had still been gained that was never lost. And today's discrimination is not exactly the same as Jim Crow. But the LSAT and similar false abstract standards of equality are today's equivalent, under today's conditions, of those supposedly "race-neutral" measures that were an inherent part of the 'ingenious improvisation' of our segregationist

past. The student intervenors may realistically assume that almost all Americans are grateful that today's discrimination comes, for the most part, without thugs in hoods, burning crosses, and lynchings—and without a governor in the schoolhouse door. But segregation and discrimination are still segregation and discrimination. It is nearly thirty years since Justice Douglas, in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), urged the University of Washington Law School to eliminate the LSAT because of its discriminatory bias against minority applicants. *DeFunis*, 416 U.S. at 340 (Douglas, J., dissenting). Yet today the plaintiff urges a course of action that would enshrine the LSAT as the very Constitutional definition of equality and calls measures to offset the test's racial biases "discrimination."

Reality is indeed in danger of being turned upside down.

D. The Constitution and *Brown* should not be perverted into the legal basis for a system of de facto segregation

At the beginning of his opinion, Justice Marshall declares, "when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier." *Bakke*, 438 U.S. at 387. This is both a desperate cry of protest and a brave assertion of optimism in the potential of American republicanism to be a part of "the movement toward complete equality." *Bakke*, 438 U.S. at 402. The students share Justice Marshall's apprehension that he might be at a tragic moment in the fight to unite the nation on the basis of integration and "genuine equality." And the students share his passionate refusal to give up even in the face of the possibility of tragic defeat.

Both the United States and the plaintiff ask this Court and the American people to declare the main function of *Brown* in American history to be preparing the way to replace a Southern system of de jure segregation of black and white with a national system of de facto segregation of white from

black, Latino, and Native American—a system to be declared untouchable by legal remedies. The student intervenors call on this Court to reject this demand to "unite" the nation by sanctioning its deepening division by race.

II. THE CONSTITUTION AUTHORIZES THE UNIVERSITY OF MICHIGAN TO ADOPT AFFIRMATIVE ACTION POLICIES TO ASSURE THAT ITS LAW SCHOOL HAS A RACIALLY DIVERSE AND INTEGRATED STUDENT BODY

A. This Court has long recognized that local educational authorities may take racially conscious steps to integrate public educational institutions

In 1954, this Court held that ". . . in the field of public education, the doctrine of 'separate but equal' has no place." *Brown*, 347 U.S. at 495.

Even if the resources devoted to separate schools were equivalent—which they never were—separate schools were "inherently unequal." They denied black students those intangible elements in education that "are incapable of objective measurement but which make for greatness . . .". *Brown*, 347 U.S. at 493, citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). They limited black students' opportunity to "study, to engage in discussions and exchange views with other students, and, in general, to learn. . ." *Brown*, 347 U.S. at 493.

Brown recognized that the effect of segregated schools extended beyond educational inequality. Segregated education denied black people full citizenship rights: it was based on and reinforced the lie of white superiority and black inferiority. By their very existence, separate schools "generate[] a feeling of inferiority in [black students] as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone." *Brown*, 347 U.S. at 494. Only fully integrated education could defeat the

baseless racist stigma of black inferiority; only fully integrated schools could break down the institutional racism that stood as a bar to democracy.

While the plaintiff cynically quotes *Brown* and even claims to stand on it, she fundamentally misrepresents the *Brown* decision. *Brown* did not merely call on the government to issue an abstract endorsement of equality; it asserted that equality could only be achieved when black and white children actually went to school together. While acknowledging the more pernicious character of segregation enforced by law, *Brown* attacked both de jure and de facto segregation:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children" [and] "*The impact is greater when it has the sanction of the law.*"

Brown, 347 U.S. at 494 (emphasis added).

Brown required the end of legal segregation and authorized government action to end de facto segregation.

Enforcing the letter and spirit of *Brown* presented an unprecedented challenge to the nation. In the wake of the *Brown* decision, battles to integrate Southern education extended from the doors of Little Rock's Central High School to the gates of Ole Miss. Inspired by the *Brown* decision, a growing youth-led civil rights movement fought to realize the promise of integration. Despite deep and prolonged segregationist opposition, by 1963, the civil rights movement had begun to transform the South.

In that summer, in the wake of Dr. Martin Luther King's stunning victory in Birmingham, Alabama, the proud, determined ranks of the increasingly integrated and powerful movement brought the fight for integration and equality to the North. The 1963 Civil Rights March on Washington gave notice to every part of the local, state, and federal governments and to the citizens of the nation that the struggle for

integration would take on de facto segregation in the North as well as de jure segregation in the South.

After the March on Washington, state and local governments in the North adopted a variety of race-conscious laws designed to end de facto segregation. Federal and state courts repeatedly held that the state and local legislative bodies had the power to enact such measures.[7] Reflecting that consensus, in 1971, every Justice *assumed* that local educational authorities could take racially conscious measures to end the de facto segregation of the public schools:

> [Local school boards] are charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.

Swann v. Charlotte Mecklenberg Bd of Educ, 402 U.S. 1, 16 (1971).

By the mid-1960's, the struggle to desegregate education had extended from K-12 education to colleges, universities, and professional schools. *Brown* was based on decisions striking down 'separate but equal' in graduate schools, and in turn this Court applied the fundamental principles of *Brown* to higher education by requiring Southern universities to take affirmative steps to end Jim Crow segregation. *United States v. Fordice*, 505 U.S. 717, 734-738 (1992).

As the Court recognized, in higher education, admission criteria performed the same function as district lines and pupil

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[7] *See*, e.g., *Offerman v. Nitkowski*, 378 F.2d 22, 24 (CA2 1967). *Springfield School District v. Barksdale*, 348 F.2d 261, 266 (CA1 1965) (Aldrich, CJ); *Tometz v. Bd. of Educ., Waukegan City School District No. 1*, 39 Ill.2d 593, 597 (1968) ("State laws or administrative policies, directed toward the reduction and eventual elimination of de facto segregation of children . . . have been approved by every high State court which has considered the issue").

assignment plans in secondary and elementary education. They determined whether blacks and whites went to school together—or whether there were separate and unequal colleges, universities, and law schools. The University of Mississippi, like many Southern universities, adopted the ACT test as a means to keep black students out. The Court struck that practice down and ordered the University to admit black students with significantly lower scores because that was needed for desegregation and because the Court held that the tests by themselves were too discriminatory and had too little ability to predict how a student could actually perform. *Fordice,* 505 U.S. at 734-738.

From at least 1868 forward, the University of Michigan Law School had not practiced de jure segregation. But as described above, in the 1960s, it was a classic example of de facto segregation. And it was not alone: every Northern law school was essentially all-white well into the 1960s. In the fall of 1965, Boalt Hall, Michigan, NYU and UCLA together had a total of four black students out of a total enrollment of 4843 students.[8]

The combined struggles of the civil rights movement, the student-led anti-Vietnam War movement, and black youth uprisings in the inner cities led to the creation and expansion of affirmative action programs in universities and law schools throughout the nation. By 1966, at Michigan, as elsewhere, leading faculty members and administrators had recognized the need for change. After an intense debate, the faculty at the Law School concluded that it could not end de facto segregation without using racially conscious measures to do so. CAJA 4854-4856.

At Michigan, as elsewhere, some faculty members objected. But no faculty member questioned the legal authority of the University to adopt the racially conscious measures

[8] Kidder, *The Struggle for Access* at 11.

needed to desegregate. As this Court did in *Swann*, the law faculties and universities of the nation assumed that their actions fell well within the scope of their authority and that their actions furthered an interest that was vital to the future of the nation. The elected University of Michigan Regents agreed, repeatedly ratifying the Law School's use of affirmative action measures. The 1978 *Bakke* decision based on *Brown* and *Sweatt* left no doubt that the Law School was well within its rights.

In asserting that the Fourteenth Amendment should prevent the University of Michigan and its elected Board of Regents from using racially conscious measures to integrate the Law School, plaintiff asks this Court to depart radically from precedent and from basic principles of separation of powers. First, plaintiff disregards the special authority of educational entities to desegregate. But even as to the contracting cases the plaintiff would wrongly apply here, she urges a sharp change in the law without acknowledging she is doing so. She argues that under those precedents public universities and other entities may only adopt race-conscious means to remedy their own prior unlawful discrimination—that is, that they may only bring race to bear when they are legally required to do so. This approach confuses limitations on the judiciary with limitations on administrative and legislative bodies. It is true that the courts do not have the power to order race-conscious remedies absent a showing of unlawful race discrimination. It does not follow that other branches of government may not do so; in fact, they may. See, e.g., *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) at 237; *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J.); *Id.*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment).

She asks that this Court use the Fourteenth Amendment to prevent elected Regents from taking steps to maintain the desegregation of a public university. If she prevails, de facto segregation will be given the same Constitutional protection

that *Plessy v. Ferguson* gave to de jure segregation. Even in the schools—which have long been said to be engines of opportunity and democracy—state action to achieve integration will be barred. American society, already deeply segregated and divided, will become more so; integration at colleges and universities will end; segregation in secondary and elementary education will increase; increased segregation will spread throughout society; and the shining moment that was *Brown* will be only a memory, for in practice, *Brown* will be a dead letter.

B. In *Bakke*, this Court approved the universities' use of racially conscious admission criteria to achieve a racially diverse student body

Affirmative action worked. At Michigan, as across the country, the number of black, Latino and Native American students increased dramatically. As is undisputed, those students were highly qualified and went on to practice with great success. As is also undisputed, white students reaped undeniable benefits from the integrated legal education that they received. Legal education and the legal profession gained from the modest amounts of integration and diversity achieved through affirmative action.

But in the wake of the attacks on school busing in Pontiac, Michigan, and Boston, there were a few, like the plaintiff, who objected when blacks and other minorities finally had the chance to go to the universities. In 1976, Alan Bakke, a white student who had been rejected by twelve medical schools, sued the University of California at Davis Medical School, claiming that his constitutional and statutory rights had been violated by the "preferences" given to black and other minority students. The Supreme Court of California sustained his challenge and ordered the elimination of any conscious consideration of the race of applicants to California's universities. *Bakke v. Regents of the University of California*, 18 Cal.3d 34 (1976).

In 1978, a majority of this Court reversed that order. Justices Brennan, White, Marshall, and Blackmun joined with Justice Powell in holding that ". . . the State has a substantial interest that may legitimately be served by a properly devised admissions program involving the consideration of race and ethnic origin." *Bakke*, 438 U.S. at 320. In that compromise, all five Justices joined in approving affirmative action programs, like those at Harvard College, that had as their central elements (1) an explicit recognition that the school would consider the race of the applicants, (2) an explicit recognition that the school would admit students from underrepresented groups with lower grades and test scores than rejected white applicants; and (3) an explicit recognition that the school would admit sufficient numbers of black and other minority students to accomplish the goal of actually achieving a racially diverse student body.

Taken together, the opinions clearly recognized a compelling state interest in integrating the universities. Following the reasoning of *Brown*, Justices Brennan, White, Marshall, and Blackmun held that integrating the campuses was necessary to assure equal education for blacks and other minorities. Standing on the achievement of *Brown*, Justice Powell held that a racially diverse student body was important to students of all races and to the nation as a whole.

Justices Brennan, White, Marshall, and Blackmun held that ". . . Davis' goal of admitting minority students disadvantaged by the effects of past discrimination is sufficiently important to justify use of race-conscious admissions criteria." *Bakke*, 438 U.S. at 369. The experience that this Court and the Nation had gained from trying to implement *Brown* had taught two lessons. First, progress requires resisting rather than appeasing white mob pressure, and second, winning support for integration from the vast majority of white Americans is possible simply by implementing con-

crete measures to bring about integration and then giving those measures time to work:

> A productive and happy life is not something that you find; it is something that you make. And so the ability of Negroes and whites to work together, to understand each other, will not be found ready made; it must be created by the fact of contact.[9]

Given this nation's history, upending segregation "root and branch" required persistence, determination, and a long-term commitment. But change was possible. Indeed, in the short time between *Brown* and *Bakke*, American society had changed dramatically and for the better. But the progress was still young and fragile.

Justice Powell's decision in *Bakke* stood squarely on the side of advancing the aims of *Brown*. By holding that the "attainment of a diverse student body," including a racially diverse student body, was "clearly a constitutionally permissible goal," his opinion kept the door of progress open. However, Justice Powell's rationale for supporting affirmative action programs—protecting the First Amendment right of universities to select a student body of their choosing to promote learning—left affirmative action policies more vulnerable to legal and political attack. Defending integration on First Amendment grounds placed the use of race-conscious measures in university admissions in a legally *sui generis* category; obscured affirmative action's fundamental nature as a means of achieving integration and equality; and left university administrations with only a single partial, but nonetheless true defense for their use of race-based admissions policies—intellectual diversity.

By explicitly recognizing the right of universities to use affirmative action programs as desegregation measures, this Court can sanction the right of universities to continue

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[9] King, *Where Do We Go From Here: Chaos or Community?* at 33 (1967)

equalizing educational opportunity, can make universities more accountable to the public, and can provide much needed protection of the gains towards integration this society has made.

C. This Court should reaffirm *Bakke*

The plaintiff, joined by the United States, has a second request, no less dangerous than her first: she asks that this Court preserve *Bakke* in name but overrule it in practice by striking down the Law School plan.

There neither is, nor can be, any plan that more clearly complies with *Bakke*. Its text comes from *Bakke*; it operates as *Bakke* required; and if it cannot pass muster, no plan can. The plaintiff mounts but two attacks on the plan, either of which, if adopted, would mean the practical end of affirmative action.

She first argues, almost in passing, that the Law School gives too much of a "preference." There is no preference. But the plaintiff wants the right to go into court every time the average difference in LSAT scores exceeds some unspecified level. The federal courts would have to set up shop in admissions offices—and affirmative action would be gone, along with the autonomy of the universities.

The plaintiff's second and main claim, joined by the United States, is that the Law School plan is the "functional equivalent of a quota." The plaintiff seizes the phrase from *Bakke* and twists its meaning beyond recognition. Justice Powell defined a quota as a rigid number that insulated students from competition and undermined individualized assessment. But short of that rigid line, he recognized that universities would have to pay "attention to numbers" to actually achieve diversity. *Bakke*, 438 U.S. at 323. The line, he declared, was fine, but "[a] boundary line . . . is none the worse for being narrow." *Bakke*, 438 U.S. at 318.

Because Justice Powell was concerned to protect the autonomy of the universities, he held that if the plan is

facially valid, the school is entitled to a presumption of good faith. The plaintiff can only overcome that presumption by meeting the high standards for proving unlawful intent under the Fourteenth Amendment. *Bakke*, 438 U.S. at 318-319, citing, *inter alia*, *Arlington Heights v. Metropolitan Housing Dev Corp*, 429 U.S. 252 (1977); *see also id.* at 319 n.53

The plaintiff does not mention, much less attempt to meet, this burden. She argued for and the district court found a quota based on admissions that it variously described as from 10 to 12 percent or 10 to 17 percent of the class; and she argued for and the dissent below found a quota based on data from the years 1995-1998 alone. Br. of U.S., at 22-23.

But these numbers show nothing. The number of residents of Ohio admitted to the Law School is doubtless stable from year to year—and there is no Ohio quota. For minority students, where the University has the authority to monitor the numbers and reason to do so, the numbers admitted would normally be even more stable without there ever being a quota.

The United States finally recognizes that it is necessary to redefine a quota in order to find one. Having first asserted that the University had a "rigid numerical target that amounts to a quota," the United States then asserted that the fact that the Law School's "target may be a range *rather than a fixed percentage* does not make it any less a quota." As support for this redefinition, the United States cites a case defining the term "quota" under the nation's fishing laws. Br. of U.S., at 23, citing *Fisherman's Dock Coop., Inc v. Brown*, 75 F.3d 164 (4th Cir 1996).

Whatever the meaning of a quota is under the fishing laws, a "range" is not the line that Justice Powell established—nor that was established in any discrimination case decided by this Court. In addition, plaintiff ignores the presumption of good faith to which the University is entitled and all the pertinent testimony by the Law School's faculty and administrators to the effect that even a target range—which would be permissible under *Bakke*—is not in operation at the Law School. *Bakke*, 438 U.S. at 318-319.

If the definition of a quota proposed by the plaintiff and the United States were adopted, the narrow but crucial line that Justice Powell established would be obliterated. Every time a School admitted a minority student, it would have to look over its shoulder to see if the numbers could be twisted into "evidence" of a quota. Many colleges would abandon affirmative action; many others would drastically cut back minority admissions. The result would be disastrous—and dishonest. In name, *Bakke* would live; in deed, it would be dead—and with it legal authority for taking action to prevent the resegregation of the nation's campuses.

D. This Court should reaffirm *Bakke* to avoid the immediate resegregation of legal education and the eventual resegregation of the profession

The impact of such a decision has been projected as disastrous; black enrollment would plummet by 75% nationwide. ut in point of fact, projections are not required; the disastrous effects of eliminating affirmative action have already been revealed in unfortunate social experiments in California, Texas, and Florida.

In 1995, the UC Board of Regents voted to eliminate the use of affirmative action policies throughout the UC System. This action was followed in 1996 by the passage of Proposition 209, which outlawed the use of affirmative action programs throughout the State of California. In 1995, the Fifth Circuit Court of Appeals in the notorious *Hopwood* decision struck down the use of affirmative action programs at the University of Texas. *Hopwood v. Texas*, 78 F.3d 932 (CA5 1996). In 2000, Florida adopted the "One Florida Initiative," terminating affirmative action by executive order. California, Texas, and Florida therefore provide excellent test

cases to assess the results of the plaintiff's vision for a "colorblind" America.

California, Texas, and Florida, three of the most populous states in this nation, already have the change in demographics that will soon characterize the whole nation. In California, 64.1% of people between 18 and 25 years old are minorities (black, Hispanic, Asian Pacific American, Native American, and biracial). In Texas, 56.5% of people between 18 and 25 years old are minorities. In Florida, 45.7% of people between 18 and 25 years old are minorities.[10] While the proportion of minority youth continues to increase, their educational opportunities plummet. The result of the elimination of affirmative action programs in these states has been to advance white privilege and degrade educational opportunities for blacks, Latinos, and other minorities and for women of all races.

It is no accident that plaintiff utterly fails to address what happened when affirmative action was prohibited in California, Texas, and Florida. The resegregation at the UC Berkeley (Boalt Hall), UCLA, and University of Texas law schools since Proposition 209 and *Hopwood* took effect in 1997 is astounding. Black students comprise a mere two percent of enrollments at these three schools in 1997-2001, a two-thirds decline compared to 1993-96.[11] UCLA only had two black law students in its 2002 graduating class of nearly 300, and Boalt, UC Davis, and the University of Washington law schools have also had post-affirmative action classes that included only one or two black students.[12]

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[10] 2000 Census; SF3, Tables PCT 12, 12H-120.

[11] Kidder, *The Struggle for Access*; *see also* U.S. Comm'n on Civil Rights, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education (Draft Report Nov. 2002), *available at* http://www.usccr.gov.

[12] Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215, 1225 (2002); Kidder, *The Struggle for Access*, at tbl.5. One of the two black UCLA students, Chrystal James, testified in *Grutter* about the heightened atmosphere of racial tension and isolation in the wake of Proposition 209. CAJA 8143-8168. Ms. James's experiences of increased racial stigmatization of students of color and of impoverished learning environment are sadly typical of other students at the UC law schools. Br. of UCLA School of Law Students of Color.

Half of U.S. Latinos now live in California or Texas,[13] yet 1997-2001 Latino enrollments at UCLA and Boalt were half of what they were in 1993-96.[14] Native American enrollments likewise dropped to token levels.[15] Placed in historical context, the "race-neutral" alternatives advanced by plaintiff and the United States are an especially bitter pill for minority students to swallow. Proposition 209 meant that black and Latino enrollments at Boalt and UCLA sank to levels not seen since affirmative action began at those schools in the late-1960s,[16] and at the University of Texas black students were the same proportion of the 1997-2001 entering classes as they were immediately following *Sweatt v. Painter* a half-century ago.[17]

Attempts by Boalt and UCLA to broaden admission criteria and experiment with class-based affirmative action confirm that there simply are no viable "race-neutral" alternatives, a finding consistent with studies of the national law school applicant pool.[18] Plaintiff's claim that "race-neutral" alterna-

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[13] U.S. Bureau of the Census, *The Hispanic Population: Census 2000 Brief*, at 3, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf.

[14] Kidder, *The Struggle for Access*, at tbl.6-7.

[15] *Id.* at 42-43. An affirmative action ban would be particularly devasting for tribal governmental bodies. Expert Report of Faith Smith, Record 262; Br. of Bay Mills Indian Community, *et al.*; Br. of New Mexico Hispanic Bar Association, *et al.*; Br. of Arizona St. U. School of Law.

[16] Karabel, *The Rise and Fall of Affirmative Action at the University of California*, 25 J. Blacks Higher Educ. 109 (1999).

[17] Kidder, *The Struggle for Access*, at tbl.6-7.

[18] *See, e.g.*, Guerrero, *Silence at Boalt Hall: The Dismantling of Affirmative Action* (2002) (tinkering with admission criteria and experimenting

tives are "surely available" is particularly disingenuous given that the plaintiff's counsel and expert witness in this case question the constitutionality of the Texas Ten Percent plan, an unsuccessful attempt to compensate for the loss of affirmative action, and doubt the University of California's compliance with Proposition 209.[19]

In Florida, a single development captures the character of the attack on affirmative action. The same year that "One Florida" was implemented, two new state law schools were established—one for black students and one for Latinos. The former, at Florida A&M University, has a total of seven faculty members. The latter, at Florida International University, has a total of 12 faculty members.[20]

In contrast, at the University of Florida College of Law—the largely white school that will become increasingly so under the dictates of "One Florida"—112 faculty members are employed.[21]

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with socioeconomic criteria were unsuccessful at Boalt); Kay, *The Challenge to Diversity in Legal Education* 34 Ind. L. Rev. 55, 72-79 (2000) (describing array of efforts at Boalt and other UC law schools); Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 14-29 (1997); Wightman, *The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data*, 53 J. Legal Educ. (forthcoming 2003). CAJA 7897-7898, 7917.

[19] Levey, *Texas's 10 Percent Solution Isn't One*, Wash Post, Nov. 12 2002, at A24; Rosman, *Thoughts on* Bakke *and its Effect on Race-Conscious Decision-making*, 2002 U. Chi. Legal F. 45, 69; Heriot, *University of California Admissions Under Proposition 209: Unheralded Gains Face an Uncertain Future*, 6 Nexus 163, 177 (2001).

[20] *See* http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/education.html; http://www.famu.edu/acad/colleges/law/; and http://www.fiu.edu/law/.

[21] *See* http://www.law.ufl.edu.

The initiative is misnamed. It should be called "Two Floridas," or, perhaps, "*Sweatt* De Facto."[22]

Students and youth, outraged by the growing segregation and inequality in California, have built a new civil rights movement to defend affirmative action and integration. In May 2001, the strength of this new civil rights movement reverberated throughout the State of California when the movement forced the UC Regents to vote unanimously to reverse their ban on affirmative action.[23]

The bans on affirmative action in California and Texas have led to greater polarization along racial lines. State university admissions systems that give special preferences "to the children of alumni, to the affluent who may bestow their largess on the institutions and to those having connections with celebrities, the famous, and the powerful," while denying opportunities to the majority of young people who reside in theses states, breed understandable anger and resentment.[24] For many already, despair replaces hope. Realization of the plaintiff's vision will inevitably lead to social explosion. *Bakke*, 438 U.S. at 404 (Blackmun, J.).

As four concurring Sixth Circuit judges found, law schools and universities across the nation should not be forced to return to the chilling prospects of such *de facto* segregation and its social consequences. PA 79a (Clay, J. concurring).

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[22] Marin & Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*," Harvard Civil Rights Project. *See also*, Horn & Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experience*, Harvard Civil Rights Project. Both are available at http://www.civilrightsproject.harvard.edu.

[23] *See UC Regents' symbolic step to spur change in admissions*, San Jose Mercury News, May 16, 2001, at 1.

[24] *See* Golden, *At Many Colleges the Rich Kids Get Affirmative Action*, Wall Street Journal, Feb. 20, 2003, at A1.

III. THE JUDGMENT BELOW SHOULD BE CONFIRMED ON THE BASIS OF THE DEMONSTRATED BIAS IN ADMISSIONS CRITERIA

A. The bias in admissions criteria renders plaintiff's proofs null

Plaintiff has failed to prove her case. She showed that there are average differences by race in test scores and grades of accepted Law School applicants, and her statistician manipulated those differences in various ways. Her claim begins and ends with the grids showing gaps by race in the two credentials. But in order for proof of the test score and GPA differences to constitute proof of reverse discrimination, the law would have to sanction the baseless and stigmatizing view that the credentials are "race-neutral"—that is, that black and other minority students are less qualified, capable, and promising than white ones. The plaintiff's expert took that interpretation for granted; the Court must not do the same.

In fact, as was proved by an overwhelming margin at trial, the problem lies not with minority students but with the measures embraced by plaintiff, which are biased in favor of whites and against minorities. The two main admissions criteria do not function as "race-neutral" measures of achievement or capacity but rather capture and reflect racial discrimination, bias, and unfairness. That is why average test scores and grades vary by race in both the national law school applicant pool and Michigan's pool. The basic data that the plaintiff presented, consisting of grids showing distributions of applicants by race, LSAT score, and GPA, graphically represent both the bias in the criteria and the necessity of maintaining affirmative action policies. The plaintiff's proofs are the students' proofs.

The casual observer viewing the grids would immediately discern that the grids are an index of the role played by race in determining scores and grades. Underrepresented minority

students on the whole have somewhat lower LSAT scores and even more modestly lower grades and are accordingly clustered in lower grid cells. There are three possible explanations for this. Anyone believing that scores and grades are objective measures of academic performance would conclude that the patterns of distribution show how far this nation still needs to travel to eliminate the educational inequality faced by black, Latino, and Native American students. A second explanation for the racial disparities is bias and discrimination captured in LSAT scores and grades themselves. A third possible view, one disavowed by all parties, would accept the racist lie of black, Latino, and Native American inferiority.[25]

At a minimum, an intellectually honest inquiry would have to eliminate the obvious possibility of bias in the data that serves as the cornerstone of plaintiff's case.

To enter into statistical analysis of a phenomenon with the data very conspicuously skewed along precisely the axis that one is investigating—the role of race—and never to ask the question "why is this data skewed?" tramples scientific integrity in polemical mud. Results reached with this method are a meaningless waste of time.

Kinley Larntz and plaintiff go a step further: they attempt to use these statistical sophistries to deceive the Court and the public and to secure a segregationist policy shift. Contaminated data and assumptions will not function as a fig leaf for the ugly project of resegregating legal education.[26]

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[25] When the students offered the testimony of Stanford University geneticist Marcus Feldman to ensure that the racist explanation, which remains widespread in American culture, would be scientifically refuted in the record, plaintiff's counsel insisted they agreed with the students and the district court ruled out Professor Feldman's testimony at trial on that basis. His expert report is included in the record as part of the summary judgment proceedings. Tr. 11, 10-12; Record 253.

[26] Even granting Professor Larntz his lazy, false assumptions about the meaning of the basic data, his methods were those of charlatanry. For

Social scientists must be faithful to the truth. Doing extensive calculations on the basis of data that clearly shows skewing in regard to the precise variable which one is investigating—and making no attempt to explain or compensate for that skewing—shows a shocking lack of integrity. Where scientists fail, the Court must not. This case which threatens the educational opportunity of millions of minority students must not be based on charlatan statistics based on ideology, not science.

B. The Law School's affirmative action policy is necessary to offset bias in numerical admissions criteria

Without affirmative action, admissions at Michigan and every other law school would consist of a rigid double stand-

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example, Professor Larntz systematically discarded evidence of non-discrimination in his work for the plaintiff. He eliminated from consideration large numbers of applicants of different races with similar grades and scores who were alike rejected. Similarly, when he engaged in cell-by-cell odds ratio analysis of applicants clustered by grades and test scores, he defined statistical significance in a manner that discounts the evidence of non-discrimination in most of the cells—putting in bold type those results which he held out as showing discrimination and dismissing the importance of results where there was no showing of differential treatment even on his terms. In point of fact, by his own standards, the 24 pages of missing odds ratios or non-bold cases (the overwhelming majority) are precisely those cases where the hypothesis of non-discrimination by the Law School could not be rejected! CAJA 5306-5350, 7388.

Even researchers who have used odds ratios in their analyses have acknowledged that "the concept of odds ratios is difficult to understand and that odds ratios have the potential to mislead readers who are unfamiliar with statistical methods." Schulman, *et al.*, *Reply to Comments on "The effect of race and sex on physicians' recommendations for cardiac catheterization,"* New England J. Med., Vol. 341: 285-287, No. 4, July 22, 1999. For this reason researchers who have documented their frequent misuse have argued that "*it is best to avoid quantitative statements about odds ratios.*" Holcomb, *et al.*, *An Odd Measure of Risk: Use and Misuse of the Odds Ratio*, Obstetrics and Gynecology, Vol. 1998, No. 4 (2000) (emphasis added).

ard giving white applicants unearned privileges and advantages and artificially diminishing the achievements and capacities of black, Latino, and Native American applicants. Taking account of race is the only way to offset this double standard and to move toward admissions policies that are fair to applicants of all races. It is also the only way for a law school to make intelligent and reasoned bets about which applicants it will be happiest to have as students and as alumni. Racial bias and discrimination would systematically distort admissions decisionmaking under the superficially "colorblind" approach proposed by the plaintiff.

The question of bias in higher education admissions credentials has arisen in both higher education affirmative action cases that have previously reached the Court.[27] In *Bakke* and *DeFunis*, the importance of such bias for the constitutionality of affirmative action programs arose without prompting by the parties. Justice Powell observed that a showing of bias in entry credentials could be a basis for upholding race-conscious admissions, but that the University of California had not made any such showing. *Bakke*, 438 U.S. at 306 n43. In *DeFunis*, Justice Douglas, dissenting from the Court's holding that the case was moot, sharply criticized the affirmative action program at the University of Washington but ultimately concluded that because the program partly offset the LSAT's bias against minorities, the rights of the white plaintiff had not been violated. *DeFunis*, 416 U.S. at 344.

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[27] As discussed *supra* at 27, plaintiff would have the Court bar all race-conscious action not required by law. In a common-law system of judicial review, of course, new arguments for affirmative action must be considered as they arise. *See*, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267 at 286 (1986) (O'Connor, J., concurring in part and concurring in judgment); *see also Wittmer v. Peters*, 87 F.3d 916, 919 (CA7 1996), *cert den* 519 U.S. 1111 (1997) (correctional needs justify affirmative action in promotions at boot camp); *Hunter v. Regents*, 190 F.3d 1061 (CA9 1999), *cert den* 531 U.S. 877 (research needs justify use of race in admissions to a laboratory school).

While the question has previously arisen, this is the first time that it has been developed and argued. The students were granted intervention because "the disparate impact of some current admissions criteria . . . may be important and relevant factors in determining the legality of a race-conscious admissions policy." *Grutter v. Bollinger*, 188 F.3d 394, 401 (CA6 1999). Four of the judges in the Sixth Circuit's majority agreed with the students that the LSAT is not a "race-neutral" criterion and that its established bias supported the Law School's affirmative action policy. PA 78a-79a (Clay, J. concurring).

This case presents an opportunity for the Court to address an issue that has been at the center of the legal and public debate[28] about affirmative action but never before developed in a record before the Court.

1. *The LSAT*

The uncontested evidence at trial proved that on national average the LSAT gives white students an unearned advantage of 9.2 points over their black counterparts at the same college with the same GPA. The unearned advantage of white test-takers relative to Latinos and Native Americans is smaller but still highly significant in competitive law school admissions systems. The LSAT has a biased impact by class as well, with wealthier students of a given race scoring higher than poorer ones. But the factor of race dwarfs that of socio-economic status: the son of black surgeons scores approximately six points lower than the son of white municipal employees. CAJA 8550-8558, JA 223-225.

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[28] *See, e.g.*, Mangan, *White Students Do Better on LSAT Than Minority Classmates With Similar GPA's, Report Says*, Chron. Higher Educ., Aug. 31, 2001; Selingo & Brainard, *Call to Eliminate SAT Requirement May Reshape Debate on Affirmative Action*, Chron. Higher Educ., Mar. 2, 2001, at A21; Schemo, *Head of U. of California Seeks to End SAT Use in Admissions*, N.Y. Times, Feb. 17, 2001; Cloud, *Should SATs Matter?*, Time, Mar. 4, 2001 at 41.

Absent affirmative action, the LSAT would function like the poll tax and grandfather clause systems developed after Reconstruction did. The plaintiff would call it "colorblind"—and it would disqualify the overwhelming majority of black applicants despite their ability to excel in law school and in the legal profession. Graphs depicting the different distributions of LSAT scores by race make it clear why overall national black enrollment at law schools would plummet by an initial and immediate 75 percent if the plaintiff prevailed. The impact would be even more disastrous at elite schools. CAJA 8722-8724, JA 218-219.

The district court conceded the disparate impact of the test and its weak correlation with law school grades. It further credited expert testimony offered by the students intervenors on two sources of the gap, the test's "academic English" load and the far greater access of white students, for reasons of cost and information, to test prep classes that substantially boost scores by an average of seven points. PA 275a-276a, 283a-284a.

Two additional sources of bias on the LSAT are clearly established in the record. The expert report and deposition testimony of Stanford University Professor Claude Steele proves that stereotype threat—the racist stigma of intellectual inferiority with which black and other minority students constantly must contend—demonstrably, substantially, and artificially depresses minority students' performance on tests thought to measure intellectual ability. Stereotype threat also exerts a broader, equally pernicious downward pressure on the general academic performance of minority students.[29] CAJA 2500-2513, 7043-7044, 7068.

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[29] In the seven years since Professor Steele first identified it, stereotype threat has become a well-documented phenemonon verified by the studies of many social psychologists. It is "now widely accepted within the field of psychology." Cunningham, *et al.*, *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 Geo. L.J. 835, 839

Finally, the content of the LSAT, like that of other such tests, is the product of test construction procedures that continually reproduce the internal bias the test has had since it was developed decades ago. The test content is arbitrary, not having been honed in relation to any external criterion such as prediction of success as a law student or lawyer, and it bears a pervasive mark of cultural and racial bias. Obviously biased question items have generally been eliminated—but because new items are statistically normed in relation to prior results, the replacements chosen are those which produce the same statistical outcomes in the pre-testing process. Thus questions on which black students outscore white students during trial runs are rejected for use in scored sections of the test, whereas those that statistically match up with the generally better performance of white test-takers are chosen for use in scored sections. The generally better performance of white students is itself partly a product of these very question selection pro-

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(2002). *See also* Br. of American Sociological Association at 16-18; Gonzales, *et al.*, *The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 Personality & Soc. Psychol. Bull. 659 (2002); Rivadeneyra, *The Influence of Television on Stereotype Threat among Adolescents of Mexican Descent*, 62 Sci. & Eng'g, 4820 (2002); Osborne, *Testing Stereotype Threat: Does Anxiety Explain Race and Sex Differences in Achievement?* 26 Contemp. Educ. Psychol. 291 (2001); Blascovich, *et al.*, *African Americans and High Blood Pressure: The Role of Stereotype Threat*, 12 Psychol. Sci. 225 (2001); Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, Atlantic Monthly, Aug. 1999, at 44; Spencer, *et al.*, *Stereotype Threat and Women's Math Performance*, 35 J. Experimental Soc. Psychol. 4 (1999); Aronson, *et al.*, *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. Experimental Soc. Psychol. 29 (1999); Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 Am. Psychol. 613 (1997); Steele & Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. Personality & Soc. Psychol. 797 (1995).

cedures. The process is circular, self-referential, and racialized.[30] CAJA 2500-2513, 3194-3199, 8058-8074, 8093-8102.

2. *Undergraduate grades*

Several factors combine to make the second major admissions credential, undergraduate grades, biased against minority students as well, although they are less so than LSAT scores.

As noted above, stereotype threat artificially depresses general academic performance in addition to scores on high-stakes tests.

In addition, most black, Latino, and Native American college students have attended segregated, inadequate primary and secondary schools or been subjected to racially skewed tracking procedures in largely white schools. On average, their undergraduate grades will be lower than those of white students who have not faced the same sharp, early pressures and constraints of institutionalized racism. These lower grades reflect differences in current levels of preparation, not differences in potential or desert. CAJA 7862-7863.

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[30] A substantial body of academic literature criticizes standardized tests such as the LSAT and SAT as unfair to minority students. Recent examples include Kidder & Rosner, *How the SAT Creates "Built-in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 Santa Clara L. Rev. 131 (2002); Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 Colum. L. Rev. 1696 (2002); Madaus & Clarke, *The Adverse Impact of High-Stakes Testing on Minority Students: Evidence from One Hundred Years of Test Data*, in Raising Standards or Raising Barriers? Inequality and High-Stakes Testing in Public Education 85 (Orfield & Kornhaber, eds., 2001); Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving "Elite" College Students*, 89 Cal. L. Rev. 1055 (2001); Dickens & Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye*, 38 Indus. Rel. 331 (1999); Jencks, *Racial Bias in Testing*, in The Black-White Test Score Gap 55, 77 (Jencks & Phillips, eds., 1998).

Unconscious prejudice lowers the grades given to minority students by even the best-intentioned professors and graduate students. CAJA 8227-8228.

Finally, minority students on the campuses from which Michigan's applicants come continue to face an environment made hostile by myriad quotidian slights and slurs. Most white students and faculty mean well but display varying degrees of unfamiliarity, ignorance, and prejudice. As UCLA Professor Walter Allen testified at trial, minority students face a daily run of slights and profiling, including professors who cannot distinguish among them; teaching assistants who make accusations of cheating when minority students score well on tests; white students who ask male minority students what sport they play; library employees who search minority students' book bags with discriminatory regularity; and campus police who require only predominantly minority parties to use the back doors of campus buildings. In countless ways, the message sent is that minority students do not belong on mostly white campuses—a message inextricably bound up with the racist stigma of intellectual inferiority. CAJA 8144-8146, 8229-8230, 8239-8240, 8243-8250, 8258-8263, 8269-8273.

These incidents have a cumulative, encumbering effect. Black students report higher levels of isolation, despair, disengagement, and alienation; more often consider dropping out; and have more difficulty relating to faculty than white students of similar socioeconomic background and with similar GPAs. They face greater challenges in achieving satisfactory grades than do white students of similar economic background. CAJA 8230-8234.

In short, grades do not have the same meaning across race.[31]

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[31] The district court credited Professor Allen's conclusions—agreeing that "many underrrepresented students find the racial climate hostile at the law school's 'feeder' institutions [. . . and that . . .] such a climate can have a negative effect on these students' acdemic performance"—but then it dismissed his testimony on the inaccurate basis that Professor Allen's opinions were founded only on a focus group study that the court did not wish to credit. PA 277a-280a. In fact, Professor Allen's testimony was also based on several large-scale longitudinal studies, on a long career during which he has produced more research on black students and educational environment than any other scholar, and on the work of numerous other researchers. CAJA 8232-8235. His principle co-investigator for the study of campus climate carried out for the students here, UCLA Professor Daniel Solorzano, has also conducted substantial research on minority students and campus climate. *See* Allen & Jewell, *African American Education Since 'An American Dilemma': An American Dilemma Revisited*, 124 Daedalus 77 (1995); Allen, *The Color of Success: African-American College Student Outcomes at Predominantly Black Public Colleges and Universities*, 62 Harv. Educ. Rev. 26 (1992); Allen, *et al.*, College in Black and White: African American Students in Predominantly White and in Historically Black Public Universities (1991); Hurtado, *et al.*, *Enhancing Campus Climates for Racial/Ethnic Diversity: Educational Policy and Practice*, 21 Rev. Higher Educ. 279 (1998); Solorzano & Villalpando, *Critical Race Theory, Marginality, and the Experience of Minority Students in Higher Education*, in Emerging Issues in the Sociology of Education: Comparative Perspectives (Torres & Mitchell, eds., 1998).

Racial isolation and alienation on college campuses are well documented elsewhere. Br. of American Educational Research Association at 24; Br. of American Sociological Association at 19-20; *see also* Feagin & Sikes, *How Black Students Cope with Racism on White Campuses*, 8 J. Blacks in Higher Educ. 91 (1995); Loo & Rolison, *Alienation of Ethnic Minority Students at a Predominantly White University*, 57 J. Higher Educ. 58 (1986). Moreover, the causes of hostile campus climate are also clear, including unconscious bias, stereotyping and aversive racism by white students and faculty. Br. of American Psychological Association at 4-11.

3. *The "general societal discrimination" decoy*

Plaintiff seeks to avoid the clear consequences of the proof below of bias in test scores and grades—i.e., her failure to prove anything and the need for affirmative action—by characterizing the students' case as resting on an argument about general societal discrimination.

The students *did* introduce copious evidence of discrimination in society. Discrimination in society is profoundly relevant to the matter at hand; without it, there would be no need for affirmative action. In fact, if there were no discrimination in society, black, Latino, and Native American students would be present on campus in far greater numbers than have ever been achieved under modest plans like Michigan's.

The Court's precedents do not stand for the proposition that discrimination in society is not relevant; they stand for the proposition that it is not enough. First, it has typically been asserted as a bare argument unsupported by record evidence. *Bakke*, 438 *U.S.* at 306; *Wygant*, 476 U.S. at 274. Relatedly, in previous cases it has not been shown to be linked to the evidentiary particulars of the matter at hand. Here, in contrast, the students proved decisively that bias and discrimination of different kinds concretely and specifically distort the two criteria that matter most in admissions and that constitute the only data plaintiff used to try to show discrimination. Finally, the students' point is not that the consideration of race remedies general societal discrimination, but rather that it takes a step toward reasoned, fair, and *accurate* assessment of minority candidates in the present and for the future, in light of the bias that causes their talents and achievements to be understated by LSAT scores and grades.[32]

4. *The Law School's intent*

Plaintiff also asks that the Court dismiss the students' arguments on the grounds that they are not the same as the Law School's reason for adopting affirmative action.

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[32] The district court erroneously held that since the precise quantum of artificial depression of LSAT scores and grades could not be determined on a student-by-student basis, the Law School was barred from considering the criteria in a race-conscious way. PA 279a-280a, 285a. This amounts to the view that the Fourteenth Amendment obligates the Law School to apply the criteria in the manner that is concededly *most* discriminatory.

The Law School itself has never made this objection and has never taken the position that the students' evidence of bias should be excluded from the case. In fact, when the school originally adopted affirmative action, the bias of the LSAT was repeatedly identified by faculty members as one of the reasons why it was necessary to take account of race, as was the desirability of diversity in the student body. The 1992 plan makes it clear that rigid application of the criteria would prevent the enrollment of reasonable numbers of minority students. Attorney Ted Shaw, who was in 1992 a member of the faculty and the Admissions Committee that drafted the policy, testified at deposition that standardized test scores are correlated with privilege and that without race-conscious efforts the Law School would be "racially exclusive." Two of the Law School's expert witnesses in this case—Professors Raudenbush and Steele—submitted reports indicating that rigid use of the LSAT would artifically deflate evaluations of minority applicants. CAJA 2500-2513, 3871-3875, 4856, 4866-4873, 5504; JA 116, 120.

The Law School in all likelihood had multiple, connected, and overlapping institutional purposes; it is implausible to imagine otherwise. But no law school in its position would express all of them, given the character of the *Bakke* decision, the coordinated attack on affirmative action by far-right law foundations that was underway by the time the policy was adopted, and this litigation itself. Any law school would focus exclusively on diversity as a rationale. The Court should uphold the court of appeals on the bases established by the students as well as that of diversity so that the full range of interlocking reasons for the necessity of affirmative action can be freely discussed without fear of lawsuits like this one.

Ultimately the intent of the Law School is to admit likely leaders. It is far too elite and selective to have to worry about academic proficiency; its applicant pool presents it with an embarassment of riches. It therefore looks to choose students who are likely to become "esteemed legal practitioners,

leaders of the American bar, significant contributors to legal scholarship and/or selfless contributors to the public interest." JA 110. With respect to these predictions, test scores and grades are of no utility whatsoever—that is, their bias against minority students is maximal. As the students showed at trial through the expert testimony of Professor Rick Lempert, who also testified as a fact witness because he was the Chair of the Admissions Committee that developed the 1992 plan, Michigan's minority alumni have been just as successful in practice as their white counterparts and have in fact provided somewhat greater levels of civic service and leadership. CAJA 6195-6305.[33]

Without affirmative action, the overwhelming majority of those minority leaders would have been rejected by the Law School on the basis of an unspoken, unfair double standard rigidly and sharply favoring white applicants. CAJA 8719-8720.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

[33] Professor Lempert's study was published. Lempert, *et al.*, *Michigan Minority Graduates in Practice: The River Runs through Law School*, Law & Social Inquiry Vol. 25, No. 4 (2000). Other studies have also shown that affirmative action beneficiaries succeed professionally at the same rates as their white counterparts. *See, e.g.*, Davidson & Lewis, *Affirmative Action and Other Special Consideration Admissions at the University of California, San Diego, School of Medicine*, 278 Journal of the American Medical Association 1153 (1997).

Respectfully submitted,

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